IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-716

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, *et al.*,

Appellants,

v.

NATIONAL COLLEGE OF BUSINESS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Regulations

Other Authorities

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This appeal brings before the Court two statutory restrictions upon the payment of veterans' educational benefits, which sharply impact those veterans who can utilize these benefits only by attending college at night. In an effort to eliminate payment of veterans' benefits to veterans attending some unworthy schools, Congress has imposed conditions which will deprive veterans in some parts of the country of any realistic opportunity to use these benefits.

Appellee National College of Business is a fully accredited, non-profit, degree-granting senior college of business, with an outstanding record of placing its graduates

in responsible business positions. Its main campus, situated in Rapid City, South Dakota, offers the only advanced business education available at night within a radius of more than 400 miles. The requirements at issue in the present case deny veterans' educational benefits if 85% of those attending a course are receiving veterans' benefits or institutional financial aid or if the course has been given for less than two years. These requirements were extended to degree-granting colleges in 1976. If applied to the College, they would deprive veterans attending the College's night courses of veterans' educational benefits, and might force the College itself to close its doors.

The United States District Court for the District of South Dakota, Honorable Andrew W. Bogue, U.S.D.J., held that the "85-15" and "two year" rules, as applied to the College, discriminated unjustifiably against veterans attending the College and thus denied them the due process of law guaranteed by the Fifth Amendment. For the reasons set forth below, appellee submits that this holding was plainly correct, and should be affirmed by this Court.

Questions Presented

1. As applied to appellee National College of Business, do the "85-15" rule of 38 U.S.C. § 1673(d) and the "two year" rule of 38 U.S.C. § 1789 discriminate so unjustifiably against veterans attending the College as to deny them due process of law under the Fifth Amendment to the United States Constitution?

2. As applied to the College, do the "85-15" rule and the "two year" rule impose such arbitrary and unnecessary limits upon the freedom of educational choice of veterans attending the College as to deny them due process of law

under the Fifth Amendment to the United States Constitution?

3. Did the procedures followed by the Veterans Administration in applying the "85-15" rule and the "two year" rule to the College and the veterans attending it deny them procedural due process of law under the Fifth Amendment to the United States Constitution?

Statement of the Case

The purpose of this statement is briefly to set forth the facts in the record relating to the background of the present controversy, substantially all of which have been omitted from appellants' Jurisdictional Statement.

1. The National College of Business

Appellee National College of Business ("the College") is a senior college of business with its main campus in Rapid City, South Dakota (Pl. Ex. 11). In addition to conducting day and evening sessions at Rapid City, the College offers night classes at thirteen extension locations in the Midwest and Far West (Pl. Ex. 24). It is a not-for-profit institution (Pl. Ex. 24, p. 5), and is accredited by the Association of Independent Colleges and Schools (Tr. 114).*

The College's home campus was founded in 1941 as a proprietary secretarial school offering a one-year course of studies (Pl. Ex. 24). The curriculum was subsequently expanded and in 1962 the College was authorized to grant

* This is the same accrediting agency that accredits the major colleges and universities in the country. In the University of South Dakota's Report of Credit Given, the College is given the highest rating which can be given to a non-liberal arts institution (Tr. 235; Pl. Ex. 8). By reason of this rating, credits earned at the College are accepted on transfer by many institutions, such as Indiana University (Pl. Ex. 8).

Associate in Science degrees (*ibid.*). In 1970 it was granted the authority to confer Bachelors degrees (*ibid.*).

The College is nationally recognized as a leader in business education (Tr. 31). It offers a high quality education to its students in a number of fields of technical business skills (Tr. 31; Pl. Exs. 23, 24). The Rapid City campus, at the present time, offers programs leading to diplomas, Associate degrees, and Bachelors degrees in areas such as accounting, business administration, and data processing (Pl. Ex. 11). Its placement record has been excellent (Tr. 91-92). The employers of its graduates have expressed approval (Pl. Ex. 7). As the most recent accrediting committee report on the College found, the instructors are both qualified and responsive to the needs of the students and the College's administration provides energetic leadership for the College (Pl. Exs. 23, 24).

The College has proven to be a valuable community resource for older persons who wish to better their employment potential through education (particularly veterans whose education was interrupted by military service), and who have family responsibilities and jobs which compel them to turn to evening education instead of traditional daytime programs (Tr. 138). The College offers the only night business education program in the Rapid City vicinity. Without its programs, many veterans and other students would be compelled to forego higher education altogether (Tr. 97-98; Pl. Ex. 18).

The College's extension locations, the first of which was founded in 1974 (Pl. Ex. 13-A), have continued the main campus's tradition of providing a quality business education. The extensions were established in areas where no comparable night programs were available (Pl. Ex. 23). The extensions offer only a program leading to a Bachelor

of Science degree in Business Administration (Pl. Ex. 23). All of the extensions received accreditation after careful study (Pl. Exs. 21, 23, 24). The qualifications of the instructors, the suitability of classroom and library facilities, and the general needs of students are carefully supervised from Rapid City (Pl. Exs. 23, 24). The success of these efforts is attested by the favorable findings on the extension programs contained in the accreditation reports (Pl. Exs. 23, 24).

Thus, the College is a tested, experienced institution of higher learning which at all of its locations provides an effective and useful education for its students.

Until 1976 the operations of the College, both at its main campus and at its extensions, were not subject to either the "85-15" rule, 38 U.S.C. § 1673(d), or the "two year" rule, 35 U.S.C. § 1789, because these restrictions did not apply to courses leading to a standard college degree. During this period the record discloses no difficulties between the College and the Veterans Administration, and no intimation of "abuses" of the veterans' educational benefits program by the College.

2. The Impact of Public Law 94-502 Upon the College

The "85-15" requirement was first enacted in 1952. 66 Stat. 667 (1952). It applied to courses below the college level, and provided that a veteran's application for benefits should be disapproved if more than 85% of the students taking the course were having all or part of their costs paid by the Veterans Administration. Public Law 94-502, 90 Stat. 2383 (1976), tightened this restriction in two respects: (1) it extended the restriction to degree-granting institutions like the College; and (2) it included in the computation of the 85% figure not only all students receiving veterans'

benefits but also all students receiving all or part of their tuition from other Federal agencies or from the school itself.

The predecessor of the "two year" rule was first enacted in 1949. 63 Stat. 653 (1949). The "two year" rule provided that a veteran's application for benefits should be disapproved if the course in question had not been in operation for at least two years, unless certain exemptions were met. The "two year" rule originally exempted degree-granting institutions. Public Law 94-502, however, added a proviso, 38 U.S.C. § 1789(c), excluding from this exemption courses offered at a branch or extension of a proprietary profit or non-profit educational institution if the branch is located outside the normal commuting distance of the mother institution.

The enactment of Public Law 94-502 had a seismic effect upon the College. For the first time, the College became subject to the "85-15" and "two year" rules. As a result, no veteran's enrollment or re-enrollment for most of its courses could be approved by the Veterans Administration. The number of students of the College who receive some form of Federal financial aid (all of whom were now counted toward the 85% under the revised "85-15" rule) has been increased by the serious drought which struck the midwestern portion of the country, and most of the College's non-veteran students are now eligible for other Federal educational benefits (*see* Pl. Ex. 13-c). John W. Hauer, President of the College, testified that if the rules were applied to the College, the existence of many of the College's branches would be jeopardized and the College as a whole might be forced to close (Tr. 148-49).

Immediately after the passage of Public Law 94-502, the College requested a waiver of the application of the "85-15" rule to all of its facilities, pursuant to 38 U.S.C.

§ 1673(d), as amended by Public Law 94-502, which authorizes the Administrator to waive the application of the "85-15" rule upon a finding that the waiver is "in the interest of the eligible veteran and the Federal Government" (*see* Complaint, Ex. F). The Veterans Administration, however, denied this application, maintaining that "blanket" waivers were not authorized by the statute and that it would not grant waivers for specific locations until administrative guidelines were promulgated (*ibid.*).*

3. The Decision of the District Court

On December 31, 1976, the College and four of its students filed suit in the United States District Court for the District of South Dakota, challenging the constitutionality of the extended "85-15" and "two year" rules (J.S. App. 1a). On that day, Honorable Andrew W. Bogue granted plaintiffs' request for a temporary restraining order (J.S. App. 1a-2a).

A hearing on plaintiffs' motion for a preliminary injunction was held on January 17 and February 7, 1977, at the close of which Judge Bogue consolidated consideration of the prayers for preliminary and permanent relief (Tr. 312). During these hearings, the plaintiffs produced substantial and uncontroverted evidence regarding the high quality of education offered at all of the College's branches (*e.g.*, Tr. 106-246; Pl. Exs. 20-24).

The District Court rendered its decision on June 25, 1977. It initially ruled that although the individual plain-

* The only guidelines which have been promulgated by the Veterans Administration for waivers of the "85-15" and "two year" rules foreclose a waiver from the "85-15" rule for any course with more than 85% veterans, and deny relief from the "two year" rule except for the exceptions mandated by statute and two other narrowly specialized exceptions which are irrelevant here, even if other comparable courses are completely unavailable in a given area. *See* 42 Fed. Reg. 42951, 42953 (Aug. 25, 1977).

tiffs lacked standing, the College did have standing to maintain the action (J.S. App. 10a-20a). On the merits, the Court held that the expanded "85-15" and "two year" rules were so inconsistent with fundamental concepts of equality as to violate the Fifth Amendment's due process clause (J.S. App. 10a-23a). In view of this holding, the District Court did not reach the other issues raised by plaintiffs' complaint, including the issues of substantive due process and procedural due process which are discussed in Points II and III below. Although the District Court did not reach these issues, this Court may affirm the judgment below upon these grounds as well as upon that relied upon by the District Court. *See, e.g., California Bankers Ass'n* v. *Schultz,* 416 U.S. 21, 71 (1974).

4. The 1977 Amendments to the "85-15" and "Two Year" Rules

Public Law 95-202, which was signed by the President on November 23, 1977, after the present appeal had been taken, made very limited changes in the "85-15" and "two year" rules. With respect to the "85-15" rule, Section 305(a)(3) of this law provides that students receiving Federal grants other than veterans' benefits shall not be included in the 85% computation pending a study by the Veterans Administration of the need for and feasibility of such inclusion.* With respect to the "two year" rule, Section 305 (a)(1)(B) authorizes the Administrator to waive its application to branches or extensions "if the Administrator determines, pursuant to regulations which the Administrator shall prescribe, it to be in the interest of the eligible

* Section 305(a)(2)(B) also exempts any institution in which veterans' enrollment is 35% or less from course-by-course enforcement of the "85-15" rule, except that the Veterans Administration may enforce the rule against any course in which it has reason to believe veterans' enrollment exceeds 85%.

veteran and the Federal Government." These amendments take effect on February 1, 1978.

In a Supplemental Memorandum filed in December 1977, the appellants suggest that "it may be appropriate" for the Court to remand this case for consideration of the effect of these amendments. A remand for such a narrow purpose would be useless. The 1977 amendments leave in effect the discrimination between veterans and non-veterans which the District Court found to be unconstitutional. The Administrator's power to grant a waiver from the "85-15" rule was equally broad under preexisting law; he has simply refused to exercise it in the case of any course with more than 85% veterans, even if no alternative course is available to veterans in the area in question (*see* p. 8 *supra*). Most of the College's courses have an enrollment of 85% veterans or more.

Appellants do not state how the 1977 amendments would affect the litigation. They do not suggest that there is any likelihood that the Veterans Administration will be willing to approve veterans' benefits for students at the College under the 1977 amendments. They do not even suggest that the Veterans Administration is prepared to consider expeditiously whether the application of the "85-15" and "two year" rules to the College is unnecessary. In the absence of any assurance that the Veterans Administration is at least willing to give serious and open-minded consideration to the question whether the "85-15" and "two year" rules should be applied to the College, appellants' suggestion of a remand should be denied (*see* Point IV *infra*).

ARGUMENT

For the following reasons, appellee submits that the result reached by the District Court was correct, and should be affirmed by this Court.

I.

The Extended "85-15" and "Two Year" Rules Violate the Standards of Equality Embodied in the Due Process Clause of the Fifth Amendment, Regardless of What Level of Scrutiny Is Employed.

Although the Fifth Amendment does not contain an equal protection clause, it does forbid discrimination that is so unjustifiable as to violate due process of law. *See, e.g., Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 533 n.5 (1973); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). The District Court, in invalidating the amended "85-15" and "two year" rules, considered it necessary to employ a "middle tier" level of equal protection scrutiny to reach that result (J.S. App. 28a-32a). For the reasons given in Point I(B) below, appellee agrees that a heightened level of scrutiny is appropriate in this case. For the reasons set forth in Point I(A), however, appellee submits that the extended "85-15" and "two year" rules deny equal protection even under a less exacting standard of equal protection.

A. The Discriminations Involved in the "85-15" and "Two Year" Rules Are Without Any Rational Basis

The minimum standard of rationality which legislative classifications must meet under the Constitution was set

forth by this Court in *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920):

> "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

See also, e.g., Johnson v. *Robison*, 415 U.S. 361, 374-75 (1974).

The extended "85-15" and "two-year" rules offend this basic standard of rationality in at least two fundamental respects. First, these rules discriminate between veterans receiving Federal educational benefits, on the one hand, and all other persons receiving Federal educational grants of any kind, on the other hand. Second, these rules discriminate between veterans living in areas where equivalent courses of study are offered by institutions which comply with the "85-15" and "two year" rules, on the one hand, and veterans living in areas (such as those served by the College) where no institutions offering a business education at night are able to meet the "85-15" and "two year" rules.

The basic fallacy of the legislation is its effort to avoid the formulation and application of qualitative standards for veterans' college education by reliance upon a mechanical formula (*see* Point II *infra*). In its execution of this scheme Congress acted without any rational basis in its impact upon smaller communities and in singling out veterans as the only Federal beneficiaries to be so circumscribed.

The disparity of treatment between veterans and other recipients of Federal educational opportunity grants is particularly abrasive because recipients of other Federal

educational grants, such as Basic Educational Opportunity Grants (B.E.O.G.) and Supplemental Educational Opportunity Grants (S.E.O.G.), were included by Public Law 94-502 in the computation of the 85% limitation under the "85-15" rule. Under this formula, if the total number of recipients of Federal educational grants—veteran and non-veteran—exceeds 85% of the total number of students, then the veterans are denied benefits entirely under the "85-15" rule, while non-veterans continue to receive their benefits exactly as they did before.* Similarly, the "two year" rule applies only to veterans, permitting non-veterans to use Federal educational grants to attend institutions which do not comply with this rule.**

This discrimination between veterans and non-veterans cannot be justified in terms of any rational legislative goal. As found by the District Court, the purpose of the "85-15" and "two year" rules is to insure the educational quality of courses taken by veterans (J.S. App. 31a)—an obviously redundant requirement for a fully accredited degree-granting institution. This is the only purpose which the appellants contend is served by either rule (J.S. 10-15).

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* As noted above (p. 8), Section 305(a)(3) of Public Law 95-202 has temporarily suspended the inclusion of recipients of other Federal educational grants from the 85% computation unless and until the Veterans Administrator determines, after completion of a study, "that it is desirable and necessary to make such computations . . . ." In all respects, however, Public Law 95-202 leaves unchanged the intended discrimination between veterans and non-veterans under the "85-15" and "two year" rules. Notwithstanding the temporary change in computation, it still denies benefits to veterans, while permitting them to other federally assisted students.

** This discrimination between veterans and non-veterans takes on added significance in light of the fact that almost 50% of Federal educational benefits are now paid to non-veterans, and that Federal educational benefit programs now aid more non-veterans than they do veterans. S. Rep. No. 94-1243, 94th Cong., 2d Sess. 89 (1976).

In terms of this legislative purpose, the distinction between veterans and non-veterans is utterly irrational and arbitrary. If falling afoul of the "85-15" and "two year" rules could be said to prove an institution unworthy of attendance by recipients of Federal educational benefits, then this would be just as true of non-veterans receiving Federal benefits as it would be of veterans receiving veterans' educational benefits.

Appellants' Jurisdictional Statement does not attempt to argue that this discrimination is rationally related to any legitimate legislative purpose. The Jurisdictional Statement does argue at some length that the "85-15" and "two year" rules "are reasonably related to the prevention of wasteful expenditures of veterans' educational benefits" (J.S. 15). But this argument does not meet the equal protection issue. Here the question is not whether the "85-15" and "two year" rules themselves have any conceivable rational basis.* The question here is whether the discrimination inherent in applying such rules to veterans and not to non-veterans has any rational basis. Appellants have not tried to suggest any rational basis for this discrimination.

In a footnote at the very end of the Jurisdictional Statement, appellants advance the familiar argument that Congress may legislate with respect to one field at a time (J.S. 15-16 n.15). But this is not what Congress has done. Congress has dealt simultaneously with Federal educational benefits paid to both veterans and non-veterans, by pro-

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* As shown in Point II below, the distinctions drawn by the "85-15" and "two year" rules between courses which have more or less than 85% veterans, or which have been in existence for less or more than two years, are themselves so arbitrary and unrelated to the educational quality of the courses as to violate the due process clause of the Fifth Amendment.

viding that they shall both be taken into account in computing the 85% limitation, but that only veterans shall be denied Federal educational benefits if this limit is exceeded.* Thus the discrimination in this case is not the inadvertent result of Congressional action in one field at a time; it is the deliberate result of an intent to discriminate among the recipients of Federal educational benefits.

Besides drawing an irrational and impermissible distinction between veterans and non-veterans, the expanded "85-15" and "two year" rules create wholly arbitrary discriminations against veterans who live in sparsely populated areas. Unlike most students whose education was uninterrupted by war or military service, many veterans are at an age where they have both a family and a full-time job, but they nonetheless wish to use veterans' benefits to attend evening classes to acquire additional education and a better job. They cannot readily move to a metropolitan center for part-time education. These veterans, like those in the Rapid City area, have a limited choice of evening educational programs. If there is no alternative educational program useful to them in their area, invocation of the "85-15" or "two year" rules will deprive them of any opportunity to utilize veterans' educational benefits. This is the case in the Rapid City area and other areas in which the College offers evening courses (*see* p. 4 *supra*). It appears to be the case in other areas as well. *See, e.g.,*

* As noted above (p. 8), Public Law 95-202 has temporarily removed non-veterans from the computation of the 85% pending further study. This action simply confirms once again that Congress has focused upon the discriminatory impact of the "85-15" and "two year" rules, and has deliberately continued the discrimination which is inherent in denying benefits to veterans but not to non-veterans, regardless of how the 85% is computed. Nowhere in the legislative history of Public Law 95-202 is there any suggestion of a rational basis for this discrimination.

Rolle v. *Cleland*, 435 F. Supp. 260, 263 n.5 (D.R.I. 1977). Veterans who live near some major metropolitan areas, on the other hand, may be expected to have a wider choice of educational programs and are thus less likely to be adversely affected by the "85-15" and "two year" rules.

Although the Constitution does not impose a *per se* rule of territorial uniformity on legislative action, *see, e.g., San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 54 n.110 (1973); *Salsburg* v. *Maryland*, 346 U.S. 545, 552 (1954), it does forbid territorial distinctions which have no rational basis. *See, e.g., Gordon* v. *Lance*, 403 U.S. 1, 4 (1971). There would appear to be no justification for treating geographically distinct groups of veterans in such a disparate manner, and appellants have suggested none, particularly in view of the stated purpose of Public Law 94-502—to assist young people "in obtaining an education they might not otherwise be able to afford." Pub. L. 94-502, § 404, 90 Stat. 2393 (1976). Surely this purpose is equally applicable in all sections of the Nation. A standard may not be so crudely drawn that it unnecessarily and arbitrarily forecloses one class of beneficiaries because of geographical considerations from benefits intended to be even-handed and nationwide.

B. The District Court Correctly Concluded That a Heightened Level of Scrutiny Is Appropriate in this Case

Although, as shown in Point I(A) above, the distinction between veterans and non-veterans in the application of the "85-15" and "two year" rules is not supported by any rational basis, an even more demanding standard of review is warranted in this case.

In recent years, this Court, on a number of occasions, has subjected legislative classifications to a more searching inquiry than that afforded by the rational basis test, al-

though not as demanding as the strict scrutiny utilized in controversies involving suspect classifications or fundamental rights. This approach was summarized last Term in *Trimble* v. *Gordon*, 430 U.S. 762, 766-67 (1977):

> "'[T]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.' *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). In this context, the standard just stated is a minimum; the Court sometimes requires more. 'Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . .' *Ibid.*"

Contrary to appellants' suggestion (J.S. 9), this stricter approach has not been confined to cases dealing with gender and legitimacy classifications. In *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), this Court struck down a statute which denied Federal Food Stamp benefits to households containing one or more members who are unrelated to the rest by utilizing a standard of review more searching than the traditional rational basis test. *Moreno*, indeed, is particularly apposite in this case since it involved a governmental benefit program, and because one of the alleged justifications for the distinction between households containing related and unrelated persons which was held insufficient by this Court was that it was designed to minimize the possibility of fraud and abuses in the Food Stamps program. This Court held in *Moreno* that even if households containing unrelated persons posed a greater threat of abuses, Congress was required to employ more delicate tools to detect potential abusers. *See* 413 U.S. at 535-38. *See also Jimenez* v. *Weinberger*, 417 U.S. 628, 636-37 (1974); *United States Department of Agriculture* v. *Murry*, 413 U.S. 508, 513-14 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438, 452-55 (1972) (distinction between single persons and married persons).

This heightened level of scrutiny is equally appropriate in this case. As the District Court noted (J.S. App. 30a), education, although not a fundamental right in the constitutional sense, *see San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 35-37 (1973), is an important personal right. *See, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 213-14 (1972). It is certainly more readily classifiable as a "sensitive" personal right—the factor which *Trimble* identified as the trigger for heightened scrutiny—than the rights at stake in some of this Court's cases which have employed such a level of scrutiny. *See, e.g., Craig* v. *Boren*, 429 U.S. 190 (1976) (right to purchase 3.2 beer). Moreover, *Rodriguez* does not necessarily foreclose the application of intensified scrutiny in this case. The Court there specifically reserved the question whether classifications which had the effect of absolutely denying educational opportunities to certain groups might be subjected to more searching examination. *See* 411 U.S. at 37. In this case application of the "85-15" and "two year" rules to certain veterans, particularly those residing in sparsely populated areas, will have the practical effect of denying them *any* higher education of the kind they require (*see* p. 4 *supra*), a situation which is markedly different from *Rodriguez* where all students at the relevant levels received some education. Appellee submits that since the classification involved here involves a *de facto* absolute denial of continued education to some veterans, heightened scrutiny is appropriate.

Under this standard of review, the distinction drawn between veterans and beneficiaries of other Federal educational benefit programs cannot stand. As we have pre-

viously demonstrated (*see* pp. 12-14 *supra*), the professed legislative purpose underlying the "85-15" and "two year" rules is equally applicable to non-veterans. Moreover, even if there were a greater possibility of "abuses" being directed at recipients of veterans' benefits—and appellants have pointed to no evidence that this is so—Congress should be required, as was the case in *Moreno, supra,* to employ more sensitive tools for eliminating abuses rather than the blunderbuss attack of these rules.

II.

The Expanded "85-15" and "Two Year" Rules Impose Such Arbitrary and Unnecessary Limits Upon the Freedom of Educational Choice of Veterans Attending the College as to Deny Them Due Process of Law Under the Fifth Amendment.

This Court has consistently held that freedom of educational choice is a right of fundamental constitutional importance which is protected by substantive due process under the Fifth and Fourteenth Amendments. In *Meyer* v. *Nebraska,* 262 U.S. 390, 399-403 (1923), and *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925), this Court held that the due process clause of the Fourteenth Amendment restrains a State from arbitrary or unnecessary restriction of the freedom of educational choice. In *Griswold* v. *Connecticut,* 381 U.S. 479, 482-83 (1965), this Court reaffirmed the principle of the *Meyer* and *Pierce* cases. *See also, e.g., Moore* v. *City of East Cleveland,* 431 U.S. 494, 501 n.8 (1977) (opinion of Powell, *J.*).

In *Vlandis* v. *Kline,* 412 U.S. 441 (1973), this Court held unconstitutional a Connecticut statute which imposed higher tuition and other fees upon nonresidents attending Connecticut State universities, and which conclusively presumed that persons whose legal address was outside Connecticut at the time of their application remained nonresidents for their entire period of attendance at the university. The Court held that such a statutory assumption violated due process "when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." 412 U.S. at 452.

The "85-15" and "two year" rules at issue in the present case strongly resemble the statute held unconstitutional in *Vlandis* v. *Kline.* The "85-15" and "two year" rules are based upon the assumption that courses which have been in existence for less than two years, or in which 85% of the students are receiving financial aid from the institution or from the Federal Government, are of substandard educational quality. The uncontradicted testimony in the record establishes that there is, in fact, no rational relationship between a course's failure to satisfy the "85-15" and "two year" rules and the quality of the course (*see, e.g.,* Tr. 201-03, 255-56). The College itself is concededly an outstanding and successful educational institution, whose quality is attested by its full accreditation (*see* pp. 3-5 *supra*). Appellants themselves conceded in response to a question from the District Court that they were not contending that the College has been guilty of any of the "abuses" at which the "85-15" and "two year" rules are aimed (Tr. 277-78).

Under these circumstances, the statutory assumption that a college course which does not satisfy the "85-15" and "two year" rules is academically substandard is arbitrary and unconstitutional under the standard of *Vlandis* v. *Kline.* As in *Vlandis* v. *Kline,* the Government here "has reasonable alternative means of making the crucial determination." In the present case, these alternatives are accreditation, the employment record of the institution's graduates,

and administrative compliance surveys of the courses offered by the institution to veterans.*

Appellants contend that restrictions upon the payment of governmental benefits are subject to a minimal due process standard of rationality, citing *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (J.S. 7-8). For the reasons given above, the "85-15" and "two year" rules do not meet even this minimum standard. Equally important, however, veterans' benefits are not mere governmental gratuities. As shown by the record in this case, military recruiting efforts stress that potential enlistees can "earn" veterans' benefits for higher education by rendering four years of satisfactory service in the Armed Services (*see, e.g.*, Pl. Exs. 1-3). The "85-15" and "two year" rules arbitrarily and unnecessarily deprive veterans who have no alternative higher education of the type they need available to them of any chance to use the benefits they have earned. This deprivation denies such veterans their right to substantive due process of law.

III.

The Application of the Expanded "85-15" and "Two Year" Rules to the College Likewise Denied Procedural Due Process of Law.

In addition to the substantive constitutional defects set forth above, the denial of procedural due process in the application of the "85-15" and "two year" rules to the College impermissibly trenched upon veterans' constitutional right not to be deprived of property without due process of law.

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* Indeed, Congress directed the Veterans Administration to undertake annual compliance surveys of institutions enrolling 300 or more veterans by Section 512 of Public Law 94-502. *See* S. Rep. No. 94-1243, 94th Cong., 2d Sess. 133 (1976).

This Court has held on numerous occasions that the Federal Government and the States cannot deprive a person of "property" without affording some kind of hearing. *See, e.g., Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *Morrissey* v. *Brewer*, 408 U.S. 471, 480-84 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 260-66 (1970). Although these opinions have provided for flexibility in the nature and timing of the hearing, *see, e.g., Mathews* v. *Eldridge*, 424 U.S. 319, 333-35 (1976), they have made clear that at some point before the deprivation is made final, a hearing must be held.

These principles are applicable in this case and, when measured against them, the "85-15" and "two year" rules are plainly deficient. Veterans' property rights are clearly at stake. They have at least as substantial an interest in the continued receipt of benefits as did the recipients of disability benefits in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and of welfare payments in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Moreover, uncontradicted evidence adduced in the District Court demonstrates the existence of a reasonable expectation of entitlement, *see Board of Regents* v. *Roth*, 408 U.S. 564, 576-78 (1972), since military recruiting efforts stress that potential enlistees can "earn" a subsidized college education by joining the Armed Forces (*see, e.g.*, Pl. Exs. 1-3).*

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* Several earlier opinions of lower courts have ruled that veterans' benefits are "gratuities" and do not create any vested rights in veterans. *See, e.g., De Rodulfa* v. *United States*, 461 F.2d 1240, 1257-58 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972); *Milliken* v. *Gleason*, 332 F.2d 122, 123 (1st Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965). These cases, however, are premised upon an analysis of government benefits which has been wholly undermined by *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Most of these cases predate *Goldberg*. *De Rodulfa*, which postdates *Goldberg*, explicitly relied upon pre-*Goldberg* precedents. *See* 461 F.2d at 1257-58 & n.102.

A complete deprivation of these property rights is threatened by the application of the "85-15" and "two year" rules to many veterans. In the face of the nature of the veterans' interest and the gravity of the threatened deprivations, the procedural deficiencies of the rules applied in this case are manifest. *See Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976). The veterans who wished to attend the College were afforded no opportunity to challenge the determination of the Veterans Administration that they should not receive veterans' benefits, or to demonstrate that the "85-15" and "two year" rules should be waived, if necessary, to permit them to attend the College.* The absence of *any* procedural safeguards for veterans clearly requires the conclusion that the "85-15" and "two year" rules, as applied in this case, fall short of the requirements established by the due process clause.

The denial of procedural due process in the present case was compounded by the arbitrariness of the standards applied by the Veterans Administration to the College's request for a waiver (*see* p. 7 *supra*). In enacting the extended "85-15" rule, Congress expressly authorized the Veterans Administration to grant waivers from this rule where such waivers are found to be "in the interest of the

* Section 307 of Public Law 95-202 requires that veterans whose benefits are being discontinued or suspended be given written notice and a subsequent statement of reasons and hearing. While this provision would not aid veterans who are denied the opportunity to enroll in a course under the "85-15" and "two year" rules (as opposed to having their benefits discontinued or suspended), it indicates Congressional recognition of the denial of due process implicit in the unavailability of a hearing. Lower court decisions had held that previous Veterans Administration termination procedures denied procedural due process. *Waterman* v. *Roudebush,* No. 4-77-Civ-70 (D. Minn. June 21, 1977); *Devine* v. *Miller,* 4 Mil. L. Rep. 2365 (C.D. Cal. 1976); *cf. Plato* v. *Roudebush,* 397 F. Supp. 1295, 1307-10 (D. Md. 1975).

eligible veteran and the Federal Government." Pub. L. 94-502, § 205(4), 90 Stat. 2387 (1976). This authority was intended to permit the Veterans Administration to exempt from the revised "85-15" rule institutions rendering needed and irreplaceable services, which should be preserved in the interests of veterans and, through them, of the Federal Government. The College, which is fully accredited, with a long history of successful operation, and which is the community's only resource for the type of education in question, is clearly such an institution. The Veterans Administration, however, refused to consider the College's request for a waiver before this action was commenced, and has promulgated regulations which narrowly and arbitrarily circumscribe its willingness to grant exemptions from the "85-15" and "two year" rules and bar any relief if 85% of the course registrants are veterans (*see* p. 7 *supra*). The regulations simply reiterate the discrimination instinct in the statute. This studied refusal to consider on the merits the College's request for a waiver has denied the procedural due process rights of the veterans who wish to attend the College.

IV.

Appellants' Suggestion of a Remand to Consider the Effect of the 1977 Amendments Is Without Merit.

In a Supplemental Memorandum filed in December 1977, appellants advised the Court of the 1977 amendments to the "85-15" and "two year" rules which have been described above (pp. 8-9), and suggested that "it may be appropriate" for the Court to remand the case for consideration of the effect of these amendments upon the College.* Ap-

* Appellants' Supplemental Memorandum further urged that the Court should accompany such a remand with a declaration that the rational basis test of equal protection, rather than any other test, applies to this case. This suggestion is without merit, both because this

pellants do not state that the 1977 amendments would terminate the application of the "85-15" and "two year" rules to the College, or even that appellants intend to give expeditious consideration to the question whether these rules should be applied to the College in light of the 1977 amendments. Most of the College's courses have an enrollment of 85% veterans or more, and therefore would be unaffected by the slight and temporary amelioration of the "85-15" rule in the 1977 amendments. Relief from the "85-15" rule would require a waiver by the Administrator, who had equally broad power before the 1977 amendments and refused to exercise it (*see* p. 8 *supra*).

Since appellants do not give this Court any concrete reason to believe that the 1977 amendments would affect appellants' application of the "85-15" and "two year" rules to the College, appellants' suggestion of a remand should be denied.*

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case merits the application of a more demanding standard of equal protection (*see* pp. 15-18 *supra*) and because appellants' request amounts to a request for an advisory opinion by way of dictum on an abstract question of constitutional law. *See, e.g., Sanks* v. *Georgia*, 401 U.S. 144, 150-53 (1971); *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-75, 584-85 (1947).

* If the Court should determine to remand this case, it should leave the judgment of the District Court in effect so as to maintain the *status quo* and to prevent the irreparable injury to the College which the District Court found would otherwise occur (J.S. App. 15-17).

CONCLUSION

For the reasons given above, the judgment of the United States District Court for the District of South Dakota entered on June 24, 1977 should be affirmed or, in the alternative, the appeal should be dismissed.

Dated: January 18, 1978

Respectfully submitted,

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